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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN DAVID WINDHORST, Appellant.	)	2 CA-CR 2007-0072 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053547

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 John David Windhorst appeals from his convictions and sentences for conspiracy to possess or transport methamphetamine for sale, illegally conducting an enterprise, and three counts of possessing nine grams or more of methamphetamine for sale. He was sentenced to concurrent, presumptive terms of imprisonment, the longest of which was seven years. Windhorst argues a ledger maintained by codefendant Donna Greenwell in this multi-defendant case was inadmissible hearsay, *see* Ariz. R. Evid. 802, and that its admission violated his Sixth Amendment right to confront witnesses against him. The state argues the ledger was not excludable as hearsay because it was the statement of a co-conspirator made during the course and in furtherance of a conspiracy, *see* Ariz. R. Evid. 801(d)(2)(E), and was also a business record, *see* Ariz. R. Evid. 803(6). The state also maintains the ledger was nontestimonial evidence and, therefore, did not implicate the Confrontation Clause. We affirm.

Relevant Background

¶2 The ledger in question was confiscated from Greenwell at the time of her arrest. It contained names, telephone numbers, and what appeared to be notations about drug transactions with the individuals listed. Windhorst's telephone number was listed under the name "Carpenter Dave," a name by which he was known at Greenwell's house, and the ledger contained entries for transactions made under the name Dave. The ledger also included entries detailing transactions between Greenwell and Dave.

¶3 According to Drug Enforcement Administration special agent Richard Kivi, the ledger contained a running balance of Windhorst's indebtedness to Greenwell and of payments he had made to her reflecting his purchases of methamphetamine with cash, with a combination of cash and credit extended by Greenwell, or in trade for labor or property. Kivi explained it is common in drug-trafficking operations for a seller to extend credit to those purchasing drugs for resale, with the balance to be paid after the drugs have been sold.

¶4 Julie Hanson, who had lived at Greenwell's house during 2004 and had helped her conduct drug transactions in exchange for methamphetamine, corroborated this practice. She testified that Greenwell "was in the habit of fronting people in order for them to come back and make money so she could ke[ep] the business going" and that Greenwell kept the ledger "to keep track of who paid in full for the meth, who did odd jobs or who still owed for it, what [drugs] she fronted to some people—it was . . . pretty detailed . . . . [S]he kept track of everything. Everything." Thus, by keeping the ledger, Greenwell "kept up on her business and she knew who owed what and she knew—she was on top of everything." Stephen Tallberg, who, like Hanson, had pled guilty to illegally conducting the enterprise with Greenwell, agreed the purpose of a ledger in drug-trafficking schemes is "to keep a detailed record of what people owed" for drugs that had been "fronted" to them.

¶5 Hanson testified the business conducted out of Greenwell's house was "[v]ery busy. Always—there was always people in the house, always, and—when you come into the

house everybody knows why you're there. You're not there for no other reason, but to get dope or get high." Hanson further stated that, like others, Windhorst's "whole—reasons for being at [Greenwell's] house was either to buy meth or do services, construction around the house for trade for meth." She said he had constructed a "secret room" inside Greenwell's bedroom closet where Greenwell had hidden drugs and money during a police raid in June 2004. A carpenter by trade, Windhorst admitted to police that he was a methamphetamine addict, that he had been at Greenwell's house daily during some portion of 2004, and that he had performed the "finish work" for a false wall in Greenwell's bedroom to provide her with "a safe, secure place."

Confrontation Clause

¶6 Because Windhorst did not object to admission of the ledger based on the Confrontation Clause, we review this claim only for fundamental, prejudicial error. *See State v. Alvarez*, 213 Ariz. 467, ¶¶ 7-8, 143 P.3d 668, 670 (App. 2006). Windhorst "bears 'the burden of persuasion in fundamental error review' and 'must first prove error.'" *Id*. ¶ 8, *quoting State v. Henderson*, 210 Ariz. 561, ¶¶ 19, 23, 115 P.3d 601, 607-08 (2005). He fails to do so.

¶7 Windhorst is correct that *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), held the Confrontation Clause of the Sixth Amendment bars admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had had a prior opportunity for cross-examination.

Thus, when "testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability [of the declarant] and a prior opportunity for cross-examination." *Id.* at 68. The Court has also made clear, however, that a nontestimonial statement by an out-of-court declarant, "while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006). "[T]he Court described testimony as 'typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."' *Crawford* further described the 'core class of "testimonial" statements' as those 'pretrial statements that declarants would reasonably expect to be used prosecutorially.'" *Bennett*, 216 Ariz. 15, ¶ 5, 162 P.3d at 656 (citations omitted). Although the state has argued the ledger here was nontestimonial and therefore did not implicate the Confrontation Clause, Windhorst has failed to address this issue. We agree with the state.

¶8 The ledger entries reflect neither "a formal statement to government officers" nor Greenwell's reasonable expectation that her statements would be used to prosecute Windhorst. *Crawford*, 541 U.S. at 51. According to the testimony of witnesses admittedly involved in the conspiracy, Greenwell kept the ledger as a means of protecting her interests in the drug-trafficking enterprise. The *Crawford* court described "statements in furtherance of a conspiracy" as a hearsay exception and "not testimonial," 541 U.S. at 56, and the Supreme Court has recently commented, "[A]n incriminating statement in furtherance of [a] conspiracy would probably never be . . . testimonial. The co-conspirator hearsay rule does

not pertain to a constitutional right . . . ." *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678, 2691 n.6 (2008) (plurality opinion); *see also United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005) (co-conspirator's statement nontestimonial). Accordingly, the admission of Greenwell's ledger did not violate Windhorst's "right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI.

Hearsay

¶9 The ledger was offered in evidence to prove the truth of entries detailing Greenwell's drug and financial transactions with Windhorst and others from late 2003 to July 2004. Rule 801(d)(2)(E), Ariz. R. Evid., provides that a statement is not hearsay if it is offered against a party and was made by the party's co-conspirator during and in furtherance of the conspiracy.

> In order for hearsay statements of co-conspirators to be admissible against a defendant, the state must establish: (1) the existence of a conspiracy; (2) the defendant's connection to the conspiracy; (3) that the statements were made in the course of the conspiracy by a co-conspirator; [and] (4) that the statements were made in furtherance of the conspiracy. . . .

State v. Stanley, 156 Ariz. 492, 495, 753 P.2d 182, 185 (App. 1988).

¶10 When the state sought to admit the ledger on the first day of trial, the court conditionally overruled Windhorst's hearsay objection, stating,

> I understand that it's a statement of a co-conspirator . . . . The State's first witness is going toward attempting to prove the conspiracy and criminal enterprise. If there's no evidence later on your client[] w[as] part of the criminal enterprise or

> conspiracy, you've got nothing to worry about. I agree it has to link up.

On appeal, Windhorst does not dispute the existence of a conspiracy or that Greenwell's ledger entries were made in the course and in furtherance of the conspiracy but contends his "involvement in Greenwell's scheme was minimal" and "[t]here was not . . . sufficient evidence to establish that [he] was genuinely a part of Greenwell's conspiracy."

¶11 We review a trial court's admission of a co-conspirator's statement for an abuse of discretion. *State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996); *see also Stanley*, 156 Ariz. at 495, 753 P.2d at 185. Windhorst cites no authority supporting the proposition that the admissibility of a co-conspirator's statement depends on the extent of a defendant's participation in the conspiracy. As our supreme court observed,

> "[T]here need be no evidence of a formerly expressed agreement between the alleged conspirators. Conspiracies are seldom susceptible to such proof. But if there is evidence, circumstantial even, of a meeting of the minds and unity of design and of co-operative conduct which could only mean that there was such an agreement, that would be sufficient foundation for the admission of evidence of subsequent independent acts and declarations of each of the parties as against any one of them. . . ."

State v. Sullivan, 68 Ariz. 81, 89, 200 P.2d 346, 351 (1948), *quoting State v. McGonigle*, 258 P. 16, 18 (1927) (alteration in *Sullivan*). Hanson's testimony alone, particularly with respect to Windhorst's construction of a "secret room" in a house that had nonstop, drug-trafficking activity, was sufficient to establish Windhorst's participation in a conspiracy for purposes of admitting the ledger. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987)

(inquiry "is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary [r]ules have been satisfied").

Kivi's Testimony

¶12 Windhorst has also suggested, in the context of his Confrontation Clause and hearsay arguments, that portions of Kivi's testimony, interpreting and analyzing the ledger entries, were inaccurate.[1] He did not object to Kivi's testimony below, however, and cites no basis for our viewing the admission of Kivi's opinion testimony as fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19, 23, 115 P.3d at 607-08. Moreover, as Division One of this court has recognized, "Courts frequently permit expert testimony [on drug-trafficking practices] and even allow experts to interpret writings or conversations." *State v. Walker*, 181 Ariz. 475, 480, 891 P.2d 942, 947 (App. 1995) (collecting cases); *see also State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004) ("The degree of [an expert's] qualification goes to the weight given the testimony, not its admissibility.").

¶13 Finally, in his reply brief, Windhorst asserts that Kivi's testimony created two levels of hearsay. This issue raised for the first time in the reply brief is waived. *State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998).

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[1]As evidence that Kivi was not qualified to interpret the ledger, Windhorst cites the state's report to the court on the third day of trial that Greenwell, who had pled guilty the previous day, had told Kivi that he had mistakenly attributed some transactions to Windhorst. We find this report of little consequence. Upon questioning by the court, counsel avowed that Greenwell had specifically affirmed all transactions with Windhorst that had been charged in the indictment.

Conclusion

¶14 We find no abuse of discretion in the court's admission of Greenwell's ledger as the statement of a co-conspirator made during the course and in furtherance of a conspiracy. Accordingly, we affirm Windhorst's convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge